

These are the tentative rulings for civil law and motion matters set for Thursday, July 28, 2011, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, July 27, 2011. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MARGARET E. WELLS AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0047998 Equable Ascent Financial vs. Soto, Bryan

Defendant's motions to compel further responses to interrogatories and request for production are granted. Plaintiff's objections are overruled. Plaintiff shall serve further verified responses, without objections, and responsive documents by August 26, 2011.

Defendant is awarded his costs for bringing these motions, in the amount of \$80, payable by plaintiff and plaintiff's attorney, jointly and severally.

2. M-CV-0050258 Wells Fargo Bank, N.A. vs. Fuentes, Alberto B.

Motion to substitute defendant is dropped as moot. Case has been dismissed.

3. S-CV-0017868 Vargas, Maria vs Martinez-Senftner Law Firm, P.C.

This tentative ruling is issued by Judge Charles D. Wachob. If oral argument is requested, such argument shall be heard on July 28, 2011, at 8:30am in Dept 42.

Plaintiff's Motion For Attorneys' Fees

Ruling on Request For Judicial Notice

Plaintiff's request for judicial notice is granted as to Items "a" through "j" and "l" through "v." Further, the court will take judicial notice of the docket information in the Court of Appeal's website pertaining to this case, which information provides a solid glimpse of procedural history of the appeal in this case.

Ruling on Evidentiary Objection

Plaintiff's objections to the Lisa Jackson declaration are overruled.

Ruling On Motion

Plaintiff prevailed at trial, and again on appeal. There is no dispute that plaintiff is entitled to a further award of attorneys' fees, having already been awarded fees after the trial of this action pursuant to Government Code section 12965(b). The only dispute here is as to the amount of fees being claimed for work in plaintiff's successful resistance of defendants' appeal.

Plaintiff requests a total award of \$576,515.51, based on a requested multiplier of 1.95. The court has considered all of the factors that would justify the imposition of a multiplier and finds that a multiplier is not warranted. In particular, the court notes that plaintiff concedes in her moving papers that the case did not involve novel or difficult issues. (Plaintiff's Memorandum 13:11-13.)

Preliminarily, the court has considered plaintiff's late reply and rejects plaintiff's contention that reasonable fees should be as high as \$671 per hour, or more, for some of the services provided. Such rates would be *unreasonable* here, given the relatively straightforward nature of the dispute, and in light of reasonable market rates for services in this community. Instead, the court will apply the fee rates utilized in determining the initial award of fees. The fees awarded pursuant to this motion are comprised of \$36,670 to attorney Mina Ramirez; \$159,326 to attorney Noah Kanter based on \$200 per hour; \$7,537.50 to attorney John Henning, based on \$250 per hour; \$11,082.50 to attorney Lawrence Murray, based on \$325 per hour; and \$4,287.50 to attorney Robert Rodriguez, based on \$175 per hour. The court awards fees for law clerks and paralegals at \$75 per hour for 234.63 hours, for a total of \$17,597.25. The court agrees with plaintiff that a 5% reduction (\$11,825.04) is appropriate as a billing adjustment to account for any duplication of effort. Thus, plaintiff's motion for an award of attorneys' fees against defendants Martinez-Senftner Law Firm, Wayne Senftner and James Senftner is granted in the total amount of \$224,675.71.

4. S-CV-0020438 County Bank vs. A.Teachert & Sons dba Teachert Construction

Cross-defendants Schwartz's motion to change venue is dropped. No moving papers were filed.

Cross-defendants Alan and Linda Schwartz's motion to set aside default and default judgment is denied. Contrary to Cross-defendants' assertion, the judgment is not void on its face as default was based on a facially valid proof of service. Assuming that Cross-defendants' assertion that they were not actually served with the cross-complaint is true, Cross-defendants were required to file this motion to set aside within a reasonable time after becoming aware of the cross-complaint. Thorson v. Western Development Corp (1967) 251 CA2d 206, 210; Trackman v. Kenny (2010) 187 CA4th 175, 180-181. A "reasonable time" has been defined as the same period as provided in CCP §473.5 –

the earlier of 2 years from the date judgment was entered or 180 days after service of written notice that default or default judgment has been entered. Schenkel v. Resnik (1994) 27 CA4th Supp. 1; Trackman, supra, at 180. While Cross-defendants filed this motion within the outside limit of what is considered to be a “reasonable time,” the court finds that, under the facts of this case, the motion is untimely. It is undisputed that Cross-defendants knew of the judgment against them no later than July 2010, when their bank accounts were levied. Alan Schwartz decl., ¶30; Linda Schwartz decl., ¶3. In fact, the judgment has been satisfied through that levy, pursuant to Cross-defendants’ stipulation in Aug. 2010 of the release of the majority of the levied funds. Linda Schwartz decl., ¶14; Stipulation re Distribution of Funds Subject to Writ of Execution, filed Aug. 26, 2010. The stipulation was approved by Cross-defendants’ attorney, the same attorney who filed this motion. Despite being represented by presumably competent counsel, Cross-defendants did not file this motion until March of this year, 8 months after being served with the notice of levy. Cross-defendants provide no explanation for this delay. A party seeking relief under CCP §473 must demonstrate diligence. Rappleyea v. Campbell (1994) 8 C4th 974, 991; Schenkel, supra, at 4.

Moreover, the court finds that Cross-defendants have actually had knowledge of the action since no later than Sept. 19, 2008, when Cross-defendant Alan Schwartz contacted Cross-complainant’s attorney and acknowledged receipt of the Request for Entry of Default. Philipps decl., ¶5. The court finds that Cross-defendant Alan Schwartz’s statement that his first contact with Cross-complainant’s attorney was in Jan. 2009 to be less than credible, given the documentation provided by Mr. Philipps of his phone conversations with Mr. Schwartz in September and October 2008. Thus, this motion was filed more than 2 years after Cross-defendants had actual knowledge of the action, making the delay in filing even more unreasonable.

Cross-complainant’s objections to the Schwartz declarations are sustained.

5. S-CV-0021071 Rawlinson, John, Jr. vs. Kelly, Joseph, et al

Appearance of petitioner and counsel required on petition to compromise minor’s claim on July 28, 2011, at 8:30am in Dept 42. Minor need not appear. The court is inclined to grant the petition upon receipt of a recent doctor report indicating that the minor’s medical condition has remained stable.

6. S-CV-0021112 Adamson, Lisa vs. KB Home, Sacramento et al

This tentative ruling is issued by Judge Charles D. Wachob. If oral argument is requested, such argument shall be heard on July 28, 2011, at 8:30am in Dept 42.

Defendant KB Homes unopposed motion for good faith settlement is granted.

If oral argument is requested, the parties may appear by telephone. Counsel for KB Homes shall arrange a conference call and shall provide the court with the information necessary to join the conference call by 4:30pm on July 27, 2011, by calling 916-408-6119.

7. S-CV-0025206 Cota-Nunez, Lorena vs. Cueto M.D., Jose Joaquin et al

Defendant Sutter Health Sacramento Sierra Region's motions to compel responses from plaintiffs Mauricio Cota and Lorenza Nunez to form and special interrogatories and request for production are granted. Verified responses and responsive documents, without objections, shall be served by August 31, 2011.

Sanctions are awarded to defendant in the total amount of \$500, against plaintiffs jointly and severally.

8. S-CV-0025696 J.C. Construction Innovations, Inc. vs. Pinney, Russell

Motion to compel responses to form and special interrogatories is dropped. No moving papers were filed.

9. S-CV-0026978 De Guzman, Agustin P. vs. BAC Home Loan Servicing

Appearance required for hearing on Defendants BAC Home Loan Servicing and MERS' motions to compel responses to form interrogatories and request for production of documents, and motion to deem requests for admission admitted. Defendants' attorney may appear by telephone. The court will contact counsel when the matter is called for hearing.

Defendants BAC Home Loan Servicing and MERS' motions to compel responses to form interrogatories and request for production of documents, and motion to deem requests for admission admitted are granted. Responses to the interrogatories and requests for production and responsive documents, without objections, shall be served by Aug. 15, 2011. The requests for admissions are deemed admitted.

Defendants are awarded sanctions of \$190 per motion, for total sanctions of \$570.

10. S-CV-0027927 Walsh, Forrest, et al vs. William Lyon Homes, Inc.

As a preliminary matter, the court notes that Plaintiffs filed a notice of non-stipulation to this Commissioner on July 22, 2011. However, as this Commissioner has previously heard numerous motions in this matter, Plaintiff is deemed to have already stipulated to this Commissioner for all matters other than trial per Local Rule 20.2(B). Thus, Plaintiff's notice of non-stipulation is untimely and ineffective.

Defendant William Lyon Homes' motion to stay is denied. Defendant seeks a stay pursuant to the Right to Repair Act (CC §§895 *et seq*). Such a stay is authorized by CC §930(b) if a homeowner fails to comply with the pre-litigation procedures in the Right to Repair Act. Defendant asserts that Plaintiffs failed to file a pre-litigation claim as required by CC §910(a) and that therefore Defendant is entitled to a stay until Plaintiffs comply with the pre-litigation procedures set forth in the Right to Repair Act. Defendant does not argue that Plaintiffs did not serve a claim at all. Defendant's position is based solely on the fact that Plaintiffs did not serve their claim on Defendant's agent for service of such claims designated pursuant to CC §912(e). However, CC §910(a)

merely requires service of the claim on the builder; it does not require service on the builder's agent designated under CC §912(e). By implication then, service on the agent designated per CC §912(e) is merely an alternative method of serving the pre-litigation notice. The Rutter Group, Civ. Pro. Before Trial, 1:872.18, *emphasis in original*. This conclusion is supported by the instructions for the form SB800 claim in Wests California Code Forms, Civil §910 Form 1, which simply states that the claim is to be served on the builder, not on the builder's designated agent under CC §912(e). Thus, Plaintiffs' written notice served on Defendant's Director for Warranty Service on Dec. 30, 2009, complied with CC §910(a) and triggered Defendant's obligations under the Right to Repair Act. Defendant failed to timely acknowledge receipt of Plaintiffs' claim, arrange for an inspection, or make an offer to repair as provided in CC §913, 916 and 917. Plaintiffs are thus excused from proceeding with the pre-litigation procedures with respect to the defects identified in their Dec. 30, 2009 claim. CC §930(a).

The court notes that Defendant asserts in its reply that a stay should be granted because Plaintiffs failed to comply with the pre-litigation procedures with respect to the non-retaining wall and drainage defects alleged in the second amended complaint. However, the notice of motion did not include this as a ground for the requested relief, nor was this issue raised in the memorandum of points and authorities filed in support of the motion. Generally, courts may only consider issues or grounds specified in the notice of motion or supporting papers incorporated by reference in the notice. Luri v. Greenwald (2003) 107 Cal. App. 4th 1119, 1125; Geary St., L.P. v. Sup. Ct. (1990) 219 Cal.App.3d 1186, 1199-1200; People v. Am. Sur. Ins. Co. (1999) 75 Cal. App. 4th 719, 726; Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808; Taliaferro v. Riddle (1959) 167 Cal.App.2d 567, 570; Traders' Credit Corp. v. Sup. Ct. (1931) 111 Cal.App. 663, 665. "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." Campos v. Anderson (1997) 57 Cal. App. 4th 784, 794 n.3. Therefore, the court will not rule on it at this time.

Defendant's request for judicial notice is granted. However, the court notes that Plaintiffs' opposition to Defendant's motion to continue, which is the document Defendant is requesting the court take judicial notice of, is not relevant to the issues raised in this motion. The scope of Plaintiffs' claims is not relevant to whether Plaintiffs properly served their claim, which is the sole basis for this motion.

Plaintiffs' request for judicial notice is granted. However, the court notes that the first amended complaint, which is the document Plaintiffs are requesting the court take judicial notice of, is not relevant as it is no longer the operative pleading. A second amended complaint was filed on June 17, 2011.

11. S-CV-0028250 Fuller, Robert vs. Wells Fargo Bank, N.A., et al

Defendants Wells Fargo and Golden West's demurrer and motion to strike are continued on the court's own motion to Aug. 18, 2011, to be heard by Judge Charles D. Wachob.

12. S-CV-0028760 Crisologo, Jennifer vs. Putnam, Stephen, et al

Defendant's motion to abate this action in favor of the family law action is granted.

As a preliminary matter, the court notes that both parties erroneously refer to the family law court's "jurisdiction" over the loan at issue vs. this court's "jurisdiction" over the issue. There is only one Superior Court of Placer County and it has jurisdiction over the issue. The question is not one of jurisdiction, but one of judicial economy. CCP 430.10(c) provides that the court may abate an action if there is another action pending between the parties on the same issue. That is the case here. In the family law action, the court specifically addressed the issue of the nature of the loan (i.e., corporate or individual), and deferred resolution of that issue for further trial. When that trial occurs, the court will rule on the issues presented. Once the family law trial on the issue occurs, there may or may not be any remaining issues to be determined in the present case. Therefore this case is stayed pending the ruling in the family law court.

Defendant's objections to evidence are overruled.

13. S-CV-0029020 Boyle, Kristi vs. Thomas, John R.

Appearance of petitioner and counsel required for hearing on petition to compromise minor's claim. Appearance of the minor is not required.

14. S-CV-0029393 Bagnulo, Maria N. - In Re The Petition Of

The petition of Peachtree Settlement Finance Company for approval of transfer of structured settlement payment rights is granted.

15. S-CV-0029434 Prospect Mortgage, LLC vs. Mittelstet, Caleb

As a preliminary matter, defendant's request to present oral testimony at the time of the law and motion hearing is denied.

Plaintiff's application for preliminary injunction is denied. Plaintiff has not demonstrated the probability of success on the merits. Plaintiff has not established that the information referred to constitutes trade secrets, or that defendant disclosed confidential information in violation of defendant's contract with plaintiff.

Defendant's objection no. 10 to plaintiff's evidence is sustained; the remaining objections are overruled.

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